oK

No. 12,877

United States Court of Appeals
For the Ninth Circuit

JOSE CABIGTING MIRANDA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

CHAUNCEY TRAMUTOLO,
United States Attorney,
EDGAR R. BONSALL,
Assistant United States Attorney,
Attorneys for Appellee.

ARTHUR J. PHELAN,
MORTON M. LEVINE,
Immigration and Naturalization Service,
San Francisco, California,
On the Brief.

Subject Index

Table of Authorities Cited

Statutes

Other Authorities

No. 12,877

United States Court of Appeals

For the Ninth Circuit

JOSE CABIGTING MIRANDA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court over the offense charged (violation of former 8 U.S.C. Section 746 (a)(1) now 18 U.S.C. 1015) is conferred by 18 U.S.C. 1291.

STATEMENT OF THE CASE.

Appellant was indicted on ten counts charging violation of former 8 U.S.C. 746(a)(1) now 18 U.S.C. 1015, however, counts VII, IX and X were dismissed by the Government during the trial. The appellant was convicted on count VIII and acquitted on counts I through VI inclusive.

QUESTIONS PRESENTED.

Appellant makes two contentions:

1. That the Court erred in denying appellant's motion to dismiss the first six counts of the indictment (upon which he was acquitted).

2. That the Government failed to produce adequate corroboration to sustain the conviction on count VIII.

ARGUMENT.

I.

THERE WAS NO PREJUDICIAL ERROR IN SUBMITTING TO THE JURY EVIDENCE PERTAINING TO THE OFFENSES CHARGED IN THE FIRST SIX COUNTS OF THE INDICTMENT.

Appellant's first contention is that the first six counts of the indictment were barred by the three-year statute of limitations contained in 18 U.S.C. § 3282 and, hence, that the admission of evidence pertaining to those counts constituted prejudicial error on the part of the trial Court even though appellant was acquitted on each of those counts.

The answer to appellant's contention is two-fold. In the first place, we submit that appellant's contention is without substance inasmuch as the jury found in his favor on each of these counts. In the second place, we submit that, in any event, appellant is in error in his contention that the offenses charged in the first six counts of the indictment were barred by the statute of limitations.

A. SINCE APPELLANT WAS ACQUITTED ON THE FIRST SIX COUNTS, NO PREJUDICE RESULTED FROM THE DENIAL OF HIS MOTION TO DISMISS THOSE COUNTS.

Appellant cites no authority which supports his contention. We submit that this contention is ruled adversely by many cases.

Even where the defendants were convicted on a number of counts, some of which were held on appeal to have been barred by the statute of limitations, the Supreme Court in *Pinkerton v. United States,* 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (rehearing denied, 329 U.S. 818, 67 S. Ct. 26, 91 L. Ed. 697) has held that the judgment cannot be reversed on error if any one of the counts is good and would sustain the judgment. We quote from footnote 1 of the opinion of the Court in that case:

> "The court held that two of the counts under which Walter was convicted and one of the counts under which Daniel was convicted were barred by the statute of limitations and that as to them the demurrer should have been sustained. But each of the remaining substantive counts on which the jury had returned a verdict of guilty carried a maximum penalty of three years' imprisonment and a fine of $5,000. Int. Rev. Code, § 3321, 26 U.S.C. § 3321, 26 U.S.C.A. Int. Rev. Code, § 3321. Hence the general sentence of fine and imprisonment imposed on each under the substantive counts was valid. It is settled law, as stated in Claassen v. United States, 142 U.S. 140, 146, 147, 12 S. Ct. 169, 170, 35 L. Ed. 966, 'that in any criminal case a general verdict and judgment on an indictment or information containing several

counts cannot be reversed on error if any one of the counts is good, and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.'

"'The same rule obtains in the case of concurrent sentences. Hirabayashi v. United States, 320 U.S. 81, 85, 63 S. Ct. 1375, 1378, 87 L. Ed. 1774, and cases cited.''

See also *Allis v. United States,* 155 U.S. 117, 15 S. Ct. 36, 39 L. Ed. 91, involving admission of testimony as to counts on which the defendant was acquitted.

Where the conviction is sustainable on one count, there is no ground for reversing the case because of error in charging as to another count. *Brooks v. United States,* 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699.

See also:

Sinclair v. United States, 279 U.S. 263, 49 S. Ct. 268, 73 L. Ed. 692;

Abrams v. United States, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173.

"The urge is that the offense, if any as charged in the second count, is a continuing one, in which time is such a material element that it is error to admit evidence relating to dates outside of the time covered in the allegation. It is not necessary to decide that question, because the evidence objected to was competent under the first count.

But, if not competent under that count, was its admission reversible error? Brown was tried and acquitted on that evidence under the first count, and it is not conceivable that such evidence could have been influential in bringing about the conviction under the second count, to support which there was much other evidence."

Brown v. United States (C.C.A. 7), 22 F. (2d) 293, at p. 294.

"This contention of error is that the court should have instructed the jury to find the defendant not guilty on counts 23 to 26, inclusive, involving the second scheme, and 27 to 30, inclusive, involving the third scheme. In view of acquittal under all of these counts, we can see no possible harm to plaintiff in the court's denial of the motion to so instruct. Had such instruction been given, the jury could have done no more than find for the defendant on these counts, and this it did without direction."

Arnold v. United States (C.C.A. 7), 7 F. (2d) 867, at p. 870.

Moreover, there would seem to be no doubt that the evidence relative to the transactions described in the first six counts of the indictment was relevant to prove knowledge and intent as well as to show a consistent pattern of conduct.

Nye & Nissen et al. v. United States, 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919.

We submit, that there was no prejudicial error in the denial of appellant's motion to dismiss the first

six counts of the indictment, since he was acquitted on each of those counts. However, we shall proceed to demonstrate that the motion to dismiss was without merit in any event.

B. THE FIRST SIX COUNTS OF THE INDICTMENT WERE NOT BARRED BY THE STATUTE OF LIMITATIONS.

For the reasons set forth above, we submit that it is not necessary to decide in this case whether the trial Court was correct in denying appellant's motion to dismiss the first six counts of the indictment, since appellant was not convicted on any of those counts. However, we submit, in any event, that appellant is in error in his contention that the first six counts were, in fact, barred by the statute of limitations.

In *United States v. Bridges,* 86 F. Supp. 922 (which is now on appeal to this Court—Case No. 12597), the District Court for the Northern District of California considered a similar count, among others, and held that prosecution was not barred by the statute of limitations. In that case the offense was committed on September 17, 1945, and the indictment was returned on May 25, 1949. The Court held in that case that the running of the statute of limitations was suspended by the Act of August 24, 1942 (18 U.S.C. § 3287) and that, in any event, the five-year statute of limitations formerly contained in 8 U.S.C. § 746(g) survived the repeal of the latter statute by the Act of June 25, 1948 (new Title 18, U.S.C.) as to violations of the former statute which were committed prior to

its repeal. In its brief in the *Bridges* case, *supra,* the Government has fully discussed the law in this regard, and since the point does not arise in the case at bar except with regard to counts on which appellant was acquitted, we shall confine our discussion here to a more brief consideration of the authorities on this particular point.

1. The five-year limitation applies to the offenses charged in this indictment.

In the case at bar each count of the indictment charges a violation of section 346(a)(1) of the Nationality Act of 1940 (formerly 8 U.S.C. § 746(a)(1)), the pertinent parts of which we quote:

> "(a) It is hereby made a felony for any alien or other person, * * *
>
> "(1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.
>
> * * * * * * *
>
> "(d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> * * * * * * *
>
> "(g) No person shall be prosecuted, tried, or punished for any crime arising under the provisions of this chapter unless the indictment is found or the information is filed within *five years*[1]

[1]The offenses charged in the first six counts of the indictment (on which counts appellant was acquitted) were committed in June, July, and August 1947. The indictment was filed on October 2, 1950. (Tr. 4-13.)

next after the commission of such crime." (Italics added.)

The foregoing subdivisions of that section were repealed by the Act of June 25, 1948, which revised the Criminal Code (Title 18, U.S.C.). We submit that the five-year limitation contained in subsection (g), *supra,* survived the repeal with regard to violations committed prior to the repeal.

The repealing section of the 1948 Act (18 U.S.C.A. §§ 1-370, p. 275) provides:

> "The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule[2] are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

The Supreme Court has considered similar language contained in the Revenue Act of 1924 in the case of *Russell et al. v. United States,* 278 U.S. 181, 188, 49 S. Ct. 121, 73 L. Ed. 255, wherein the Court said:

> "Paragraph (e), (2), of § 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without

[2]The schedule of repealed sections or parts thereof lists "Title 8, U.S. Code, section 746 (a-h)".

> definite purpose. The rather obvious design, we think, was to deprive § 278 of any possibile application to cases where assessment had been made prior to June 2, 1924."

We submit that the situation here presented is a direct parallel to the *Russell* case, *supra,* and that the new statute of limitations cannot be retroactively applied to violations committed prior to its enactment because of the provision that existing liabilities "shall not be affected" by the repeal.

The Supreme Court in another case, viz., *United States v. St. Louis, San Francisco and Texas Railway Company,* 270 U.S. 1, 46 S. Ct. 182, 70 L. Ed. 435, has again held that a statute of limitations did not bar a cause of action which had accrued before its enactment. In that case the Court said:

> "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure. *United States Fidelity and Guaranty Co. v. United States,* 209 U.S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co. v. Northern Pacific Ry. Co.,* 266 U.S. 435. There is nothing in the language of paragraph 3 of § 16, or in any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies, under any circumstances, to causes of action existing at the date of the Act."

Here there is neither "explicit language" nor "necessary implication" justifying retroactive application of the new statute of limitations. (18 U.S.C. § 3282.) In fact, as pointed out above, the new statute itself expressly provides that existing liabilities shall not be "affected", and this precludes application of its new limitation provisions to prior offenses. (*Russell et al. v. United States, supra.*)

We are aware that in *United States v. Obermeier,* 186 F. (2d) 243, cert. den., 340 U.S. 951, 71 S. Ct. 573, 95 L. Ed. 452 (upon which appellant relies and which we shall later discuss more fully), the Court held that the five-year limitation of 8 U.S.C. former § 746(g) was not preserved by the repealing section of the 1948 Codification Act because the language of the saving clause operated to preserve only substantive liabilities and did not preserve limitations which the Court considered to be simply matters of procedure. We submit that this holding is directly contrary to the principles laid down by the Supreme Court in the cases of *Russell et al. v. United States, supra,* and *United States v. St. Louis, San Francisco and Texas Railway Company, supra.* Furthermore, in *United States Fidelity and Guaranty Company v. United States for the use of Struthers Wells Company,* 209 U.S. 306, 28 S. Ct. 537, 52 L. Ed. 804, the Supreme Court specifically considered a contention that where an amendment to a statute relates only to procedure it necessarily takes effect upon causes of action existing when the amendment was passed, and said:

"If the limitation as to the district in which the suit upon the bond could be brought were to be regarded as simply matter of procedure (which we do not assert), we still think it is not to be construed as applying retrospectively. As it is only a question of intention we are not prepared to hold that the section is prospective in its operation in regard to all its other provisions, but retrospective in the one instance, as to the district in which the suit is to be commenced. *Even matters of procedure are not necessarily retrospective in their operation in a statute, and we see no reason for holding that this statute, of but one section, should be split up in its construction, and one portion of it made applicable to cases already existing and other portions applicable only to the future.*" (Italics added.)

That the five-year limitation contained in 8 U.S.C. former § 746(g) survived the repeal with regard to violations committed prior to the repeal is also clear from Title 1, U.S.C. § 109, which, so far as is pertinent, provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, *and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.* * * *" (Italics added.)

The section last quoted must be read as though it were a part of the repealing statute.

Great Northern Railway Co. v. United States, 208 U.S. 452, 28 S. Ct. 313, 52 L. Ed. 567;

United States v. Reisinger, 128 U.S. 398, 9 S. Ct. 99, 32 L. Ed. 480.

So read, the repealing statute declares, in effect, that 8 U.S.C. § 746(a) to (h) are repealed, but that such repeal shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred thereunder, and that "such statute (including subdivision (g)—the five-year limitation clause) *shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement* of such penalty, forfeiture, or liability." (Italics and parenthetical phrase added.)

This Court in the case of *DeFour v. United States,* 260 Fed. 596, 599, has held that the provisions of 1 U.S.C. § 109, *supra* (then embodied in R.S. § 13) are to be treated as if incorporated in subsequent enactments of Congress and must be enforced as forming a part of such subsequent enactments, except in those instances where, by express declaration or necessary implication, such enforcement would nullify the legislative intent. This Court further held in that case that legislative intent to disregard these provisions is not to be found in the mere fact of repeal of a pre-existing statute, since "such a repeal as that is expressly contemplated by section 13". Consequently, the mere fact that Congress repealed subsection (g)

of 8 U.S.C. § 746, discloses no intention that the newly enacted limitation is to override the prior limitation in prosecutions for offenses committed prior to the repeal.

In line with the foregoing principle, the Court of Appeals for the Fifth Circuit has held in the case of *United States v. Carter et al.,* 171 F. (2d) 530, that to abolish preexisting "remedies" an express provision therefor must appear in the repealing statute, because of 1 U.S.C. § 109, *supra.*

Similarly, in *National Labor Relations Board v. Gate City Cotton Mills* (C.C.A. 5), 167 F. (2d) 647, it was held that a new enactment fixing a time limitation for proceedings to prevent unfair labor practices was not applicable where the cause of action arose prior to the passage of the new enactment. (Citing 1 U.S.C. § 109, *supra.*)

We submit, therefore, that whether the limitation carried in section 746(g), *supra,* be a matter of procedure or one of substance is immaterial to the question here presented. We submit further that section 746(g) is to be treated as still remaining in force under 1 U.S.C. § 109, *supra,* for the purpose of sustaining a prosecution for a liability incurred under subdivision (a) of section 746.

In *Lovely v. United States* (C.C.A. 4), 175 F. (2d) 312 (cert. den. 338 U.S. 834), it was held that the provisions of 1 U.S.C. § 109, *supra,* prevent a Court from imposing the lesser sentence provided for in the 1948 Code and made it mandatory upon the Court to im-

pose the greater punishment prescribed in the repealed statute, in the case of an offense which was committed prior to the repeal. (See also *United States v. Kirby* (C.C.A. 2), 176 F. (2d) 101, to the same effect.) That proposition stands out most starkly in the case of *Lovely, supra,* because the repealed statute carried a mandatory sentence of life imprisonment for the offense of which the appellant stood convicted, whereas the new statute covering such an offense gives the Court discretion to sentence to imprisonment "for any term of years or for life".

In *Hiatt v. Hilliard* (C.C.A. 5), 180 F. (2d) 453, involving the question of whether the more liberal procedure for computing good conduct allowances of prisoners, which was enacted in the codification of Title 18, U.S.C., should be given retroactive effect, the Court said:

> "Whether a statute operates retroactively or prospectively is one of legislative intent. In gathering this intent, certain settled rules of statutory construction apply. Some of these are: that a statute should not be given retroactive effect where another construction is fairly permissible; 'that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.' Fullerton-Krueger Lumber Co. v. Northern Pac. Ry. Co., 266 U.S. 435, 45 S. Ct. 143, 144, 69 L. Ed. 367, and cases cited; that in considering statutes, 'The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that

> intention be clearly declared.' Shwab v. Doyle, 258 U.S. 529, 42 S. Ct. 391, 392, 66 L. Ed. 747, 26 A.L.R. 1454; that 'Retroactivity, even where permissible, is not favored, except upon the clearest mandate.' Claridge Apts. Co. v. C.I.R., 323 U.S. 141, at page 164, 65 S. Ct. 172, at page 185, 89 L. Ed. 139."

When those settled rules of construction are considered in conjunction with the saving clauses in section 21 of the 1946 Act and in 1 U.S.C. § 109, *supra,* the conclusion is irresistible that the new limitation is not to be retrospectively applied to prosecutions for violations of the repealed provisions.

The three Supreme Court decisions which the Court cited in the *Obermeier* case as restricting the application of former R.S. § 13 (now 1 U.S.C. § 109) to so-called "substantive" rights and liabilities and not preserving remedies or procedure, did not involve statutes of limitations and do not impel the conclusion reached in that case.

For example, in *Great Northern Railway Co. v. United States, supra,* the argument presented by the appellant grew out of a saving clause in an amendatory statute that "The amendments herein provided for shall not affect causes now pending in Courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." The defendants contended that this language negatived an intent to preserve *any* liabilities except where suit was already pending. What the Supreme

Court really held was that since the new statute spoke only of the *procedure* to be applied in pending suits, this evidenced no Congressional intent to cut off the right to prosecute for prior offenses, which right was saved by the general provisions of R.S. § 13. When analyzed in the light of the facts and contentions then under consideration, the decision does not place upon R.S. § 13 the restricted interpretation deduced by the Court in the *Obermeier* case.

The case of *Hertz v. Woodman,* 218 U.S. 205, 30 S. Ct. 621, 54 L. Ed. 1001, also cited in the *Obermeier* decision, involved the question whether a tax liability had accrued under the prior statute at the time of its repeal. The question, therefore, was simply whether in that case there was *any* "liability" upon which R.S. § 13 could operate.

The third case cited in the *Obermeier* opinion on the point under discussion is *Hallowell v. Commons,* 239 U.S. 506, 36 S. Ct. 202, 60 L. Ed. 409. In that case the repealing act had taken away the jurisdiction of the Courts with regard to certain Indian claims and had restored exclusive jurisdiction over those matters to the Secretary of the Interior. The Court found, in the situation there presented, evidence of a Congressional intent to apply the new statute retroactively, feeling that the amendment "evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of Indian affairs". The Court said, in passing, that this "takes away no substantive right but simply changes the tribunal that is

to hear the case." We fail to see any support here for the restricted interpretation given 1 U.S.C. § 109 and section 21 of the 1948 Codification Act by the Court in the *Obermeier* case.

In the *Obermeier* case great emphasis was laid on the fact that in enacting the Revised Statutes of 1874, and again in enacting the Criminal Code in 1909, Congress included, in addition to the general saving provision then contained in R.S. § 13 (now 1 U.S.C. § 109), another provision specifically preserving pre-existing periods of limitations applicable to offenses committed prior to the revision and repeal of the old law. From this, the Court reasoned that since special provisions were deemed necessary on those occasions to save statutes of limitations in prosecutions under the old law, if Congress had intended to save the five-year period of limitation contained in 8 U.S.C. § 746 in prosecutions for offenses committed prior to the repeal, it would have so stated in section 21 of the 1948 Act. This reasoning takes no account of the broad and all-embracing language of section 21 which says that "Any rights or liabilities now existing under such sections or parts thereof shall not be *affected* by this repeal." Giving these words their ordinary meaning, and considering them in the situation in which they were used, it seems clear that what Congress intended to convey was that the repeal should not change the situation in any respect with regard to past transactions. (Cf. *Russell et al. v. U. S., supra.*) Certainly in its ordinary meaning, this language cannot be reconciled with a theory which

would operate to abate prosecutions which might even be then pending. The latter effect is the necessary result of the holding in the *Obermeier* case, and we submit that it cannot be sustained on a reasonable interpretation of the statutory provisions here involved.

We submit that, in the circumstances here presented, to say that the statute of limitations is a mere matter of "procedure" is to beg the question. The question is whether a specific subsection (8 U.S.C. former § 746(g)) of a repealed statute is to be "treated as still remaining in force for the purpose of sustaining any * * * prosecution" for the enforcement of a liability incurred under the old law. Can we say that subsections (a) to (f), the so-called "substantive" parts of that section, are in effect for the purpose of sustaining such a prosecution, but that subsection (g) is not in effect for that purpose? We submit that the answer to this latter question must be in the negative under any reasonable interpretation of the language of 1 U.S.C. § 109 and section 21 of the 1948 Codification Act. Consequently, we submit that the five-year statute of limitations formerly contained in 8 U.S.C. § 746(g) is applicable rather than the three-year limitation contained in 18 U.S.C. § 3282.

2. In any event, the statute of limitations was tolled by the Suspension Act.

The violations charged in the first six counts of the indictment in the case at bar were committed during

June, July, and August 1947, and the indictment was returned on October 2, 1950. (Tr. 4-9.) The so-called Suspension Act of August 24, 1942, as amended (18 U.S.C. § 3287) provides that:

> "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress."

If the offenses charged in the first six counts of the indictment in the case at bar fall within the terms of the Suspension Act, the statute of limitations did not begin to run until December 31, 1949. (*United States v. Choy Kum et al.* (D.C., N.D., Cal.), 91 F. Supp. 769.)

The Suspension Act applies to "every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense".

United States v. Noveck, 271 U.S. 201, 204, 46 S. Ct. 476, 70 L. Ed. 904;

United States v. Scharton, 285 U.S. 518, 522, 52 S. Ct. 416, 76 L. Ed. 917;

Bailey v. United States (C.C.A. 9), 13 F. (2d) 325, 326;

United States v. Gottfried et al. (C.C.A. 2), 165 F. (2d) 360 (cert. den., 333 U.S. 860,

68 S. Ct. 738, 92 L. Ed. 1139, and rehearing denied, 333 U.S. 883, 68 S. Ct. 910, 92 L. Ed. 1157);

Falter et al. v. United States (C.C.A. 2), 23 F. (2d) 420, 426 (cert. den., 277 U.S. 590, 48 S. Ct. 528, 72 L. Ed. 1003);

Miller v. United States (C.C.A. 2), 24 F. (2d) 353, 360 (cert. den., 276 U.S. 638, 48 S. Ct. 421, 72 L. Ed. 745);

Weinhandler v. United States (C.C.A. 2), 20 F. (2d) 359, 361 (cert. den., 275 U.S. 554, 48 S. Ct. 116, 72 L. Ed. 423);

Evans v. United States (C.C.A. 4), 11 F. (2d) 37, 39;

United States v. Agnew (D.C., E.D., Pa.), 6 F.R.D. 566;

United States v. Choy Kum et al., supra.

While the statutory provision defining the particular offense involved in the case at bar (8 U.S.C. former § 746(a)(1)) does not use the word "fraud", there is strong support for considering that fraud is implicit in this offense.

In the denaturalization case of *Knauer v. United States,* 328 U.S. 654, 672-673, 66 S. Ct. 1304, 90 L. Ed. 1500, the Court clearly showed that it considers that false swearing in connection with obtaining citizenship is a fraud against the Government.

In *United States v. Ness,* 245 U.S. 319, 324, 38 S. Ct. 118, 62 L. Ed. 321, Mr. Justice Brandeis said:

> "Experience and investigation had taught that the wide-spread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of *perjured testimony* in cases of this character." (Italics added.)

There are several strong indications that Congress considered false swearing in naturalization proceedings as involving fraud. For example, one of the grounds for denaturalization prescribed by section 338(a) of the Nationality Act of 1940 (8 U.S.C. § 738(a)) is fraud in the procurement of the certificate. If falsehood and deception in a naturalization constitute fraud against the United States for purposes of denaturalization, it is difficult to see why such false swearing as is charged in the case at bar is not a fraud against the United States within the meaning of the Suspension Act. Speaking of such false swearing in a naturalization proceeding in *Del Guercio v. Pupko,* 160 F. (2d) 799, this Court said:

> "Should the courts condone these deceitful practices the whole procedure preliminary to naturalization would be effectively undermined and the declared purpose of Congress frustrated. Cf. Knauer v. United States, 328 U.S. 654; United States v. Goldstein, 30 F. Supp. 771, 773. Clearly the perpetration of such a fraud upon the government in the very process of naturalization involves moral turpitude and exhibits the unfitness of the applicant for the high privilege of citizenship."

While the Court was not there considering the applicability of the Suspension Act, nevertheless the opinion illustrates the broad fashion in which "fraud" is used for the various purposes of the naturalization laws. This is borne out by the legislative history of the denaturalization provisions. The House Report dealing with cancellation of naturalization on grounds of fraud (House Report 1789, 59th Cong., 1st Sess., p. 2) said:

> "The conditions that have been revealed by special investigations of the frauds committed against the naturalization laws render wholly unnecessary any argument upon the necessity at this time of fully exercising all the authority in naturalization matters conferred by the Constitution upon Congress. * * * The worst and most glaring frauds have consisted in perjury, false impersonation, and the sale and use of false and counterfeit certificates of naturalization."

See also *Knauer v. United States, supra,* at pages 671-672, and *United States v. Ness, supra.*

The holding in *United States v. Obermeier, supra,* that the Suspension Act does not apply to the offense involved here was based entirely on three decisions of the Supreme Court which considered specific statutory offenses arising under the Revenue Acts. (*United States v. Noveck,* 271 U.S. 201, 46 S. Ct. 476, 70 L. Ed. 904; *United States v. McElvain,* 272 U.S. 633, 47 S. Ct. 219, 71 L. Ed. 451; and *United States v. Scharton,* 285 U.S. 518, 52 S. Ct. 416, 76 L. Ed. 917.) These three cases, however, dealt with an excepting proviso which

distinguished those internal revenue offenses which were denominated as containing an element of fraud from those offenses which were not so denominated. The question was as to the intended scope of an excepting proviso to a particular statute, and it was in those circumstances that the Court looked to the words of that statute for the solution of the particular problem of interpretation there presented. The resulting anomaly was shortly removed by Congress. (Cf. *Braverman v. United States,* 317 U.S. 49, 54-55, 63 S. Ct. 99, 87 L. Ed. 23.)

The Suspension Act which is under consideration here was separately enacted to forward a general policy, and the reasons for strict construction of the excepting proviso considered in the *Noveck, McElwain,* and *Scharton* cases do not here exist.

We submit that the offense of false swearing in a naturalization proceeding is one which involves fraud against the United States within the meaning of the Suspension Act (18 U.S.C. § 3287), and, hence, that the statute of limitations did not begin to run until December 31, 1949. Consequently, we submit that the first six counts were not barred, regardless of whether the five-year statute or the three-year statute is applicable.

II.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT ON COUNT VIII.

The second point advanced by appellant is that there was not sufficient corroboration to justify a verdict of guilty on count VIII.

Initially, it should be observed that count VIII is not predicated on a violation of the general perjury statute,[3] but on Section 346(a)(1) of the Nationality Act of 1940. This Section of the Nationality Act has been codified at 18 U.S.C. (1948 rev.) 1015 under the chapter designation of "Fraud and False Statements" along with 18 U.S.C. 1001, relating to false statements or entries generally in any matter within the jurisdiction of any department or agency of the United States. The general tenor of the language of Section 346(a)(1) much more closely resembles the offense proscribed by the present 18 U.S.C. (1948 rev.) 1001 relating to "Statements or Entries Generally" than it does to 18 U.S.C. (1948 rev.) 1621, the general perjury section. This Court has held that the rule laid down in *Weiler v. United States,* 323 U.S. 606, that the uncorroborated testimony of one witness is not enough to sustain the charge of perjury, is inapplicable in a prosecution under 18 U.S.C. (1948 rev.) 1001. *Todorow v. United States,* 173 F. (2d) 439, 443-444, certiorari denied, 337 U.S. 925. By a parity of reasoning, it should also be inapplicable to proof of a violation of Section 346(a)(1) of the Nationality Act of 1940.

---

[3]Now found at 18 U.S.C. 1621.

It is apparent that appellant has misconstrued this rule and believes that every single element of proof must be in itself established by more than the uncorroborated testimony of one witness. Such is not the rule. The only element of proof required to be corroborated is that of the falsity of the statements made by appellant. 70 C.J.S. 539; *United States v. Hall,* 44 Fed. 864; *United States v. Hiss,* 185 F. (2d) 830 (C.A. 2), certiorari denied, 340 U.S. 988; *United States v. Seavey,* 180 F. (2d) 837, 839 (C.A. 3), certiorari denied 339 U.S. 979; *United States v. Palese,* 133 F. (2d) 600, 603-604 (C.A. 3). The *Weiler* case cited *supra,* requires no more than that defendant shall not be convicted by an oath against his oath. *Maragon v. United States,* 187 F. (2d) 79 (C.A.D.C.) certiorari denied 341 U.S. 932.

The jury in the case at bar had to answer two questions:

(1) Did appellant make the statements alleged by appellee?

(2) Were such statements false?

As argued supra, it was only necessary that appellee establish to the satisfaction of the jury that the said statements were made. The making of the statements was established not only by the testimony of the Naturalization Examiner (T.R. 210-226), but by the testimony of the petitioner for naturalization (T.R. 199-210) as well as the executed form "Petition for Naturalization" upon which the statements were noted. (Ex. No. 8.)

As to the second question to be determined by the jury, the government did not rest its case on the oath of one witness, but on the testimony of the Examiner (T.R. 210-226), the testimony of the petitioner (T.R. 199-210), documentary evidence (Ex. 8, 9 and 10) and the testimony of the appellant himself. (T.R. 251-257, 278, 305-307.) The statements in question were to the effect that appellant was acquainted with petitioner and saw the petitioner, monthly, during the period of time, 1942 to 1946—a period during which appellant admits that he was not in the Continental United States. As indicated above, such absences are also borne out by appellant's Navy Record, which was made an exhibit. (Ex. No. 9.) In fact, it may be stated that there is no dispute between the parties that if the statements were in fact made, they would be false. This is conceded in appellant's brief. (p. 5.)

Therefore, far from failing to meet the quantitative rule that perjury or that false statements be proven by more than just an oath for an oath, the appellee has greatly exceeded the requisite minimum quantum of proof.

CONCLUSION.

We submit that no prejudicial error has been shown and that the judgment of the Court below should be affirmed.

Dated, San Francisco, California,
December 10, 1951.

CHAUNCEY TRAMUTOLO,
United States Attorney,
EDGAR R. BONSALL,
Assistant United States Attorney,
Attorneys for Appellee.

ARTHUR J. PHELAN,
MORTON M. LEVINE,
Immigration and Naturalization Service,
San Francisco, California,
On the Brief.